IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76 - 6767

FRANK RICARDO SCOTT

and

BERNIS LEE THURMON,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Throughout its brief, the Government has misconstrued Petitioners' arguments, especially in its assertion that Petitioners are promoting a completely subjective test. While this and other misreadings will be clarified, infra, Petitioners wish first to bring to light some parts of the record which the Government has ignored.

Judge Waddy, in the District Court below, concluded that "[t]he admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable." App.39. The Government contests that conclusion by attaching the findings on which that conclusion was based, Gov't Br. 36-39, but has misrepresented those findings.

First, the Government asserts that Finding 4, App. 36, states only that the agents listened to and recorded all calls. Gov't Br. 36. Finding 4 reads as follows:

> 4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

App. 36. Obviously, the court below found it to be more than just a matter of recording all calls and the record supports those findings.[1/]

1/ For instance:

> Q. All right. So what I'm saying is that regardless of the nature of the call, except those three privileged categories, all calls were to be recorded whether narcotics - related, or otherwise, preserved and then passed on to review by Mr. Sullivan, is that correct, sir?
>
> A. Basically, that is correct, sir.

App. 171. See also App. 170-171. The agents recorded all despite the fact that the agents knew of the minimization requirement, as the Government concedes. Gov't Br. 35.

Second, the Government claims that Petitioners and Judge Waddy have misread a portion of Agent Cooper's testimony in which he admits that he and the agents under him took no steps to minimize, except when they accidentally listened to the wrong line.[2/] According to the Government, Agent Cooper really meant to say that no calls were not in fact intercepted, not that the agents never otherwise gave consideration to the minimization requirement of the order. Gov't Br. 37. There is no basis in the record for any such interpretation of this testimony. Throughout both hearings it is clear that both Cooper and Judge Waddy knew the mean-

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2/ Gov't Br. 36-37. The testimony, found in Judge Waddy's Finding No. 10, App. 37 and pp. 680-681 of the 1974 hearing transcripts, reads as follows:

> BY THE COURT:
> Q Agent Cooper, at a hearing-at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?
> A. That is correct, Your Honor.
> Q. And also that there were times when you, yourself, did the listening?
> A. That's correct.
> Q. The question I wish to ask you is this, whether at any time during the course of the wiretap-of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?
> A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtain the reception of conversations was in that instance where the line was connected to-misconnected from the correct line and connected to an improper line. We discontinued at that time.
> Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?
> A. That is correct, Your Honor.

ing of minimization."[3/]

Finally, the Government's brief boldly states that "[t]he record affords no basis for concluding that the agents proceeded in bad faith..." On the contrary, the record is replete with indications of bad faith. See Findings 3,4,9,10 and 13, App. 36-38. See also note 11, supra. As the Government concedes, Gov't Br. 35, the agents knew of the minimization requirement. They also analized 60% of the calls as non crime-related, yet never took steps to cut off the wiretap. App. 36 (finding); 175 (testimony of Cooper). That is bad faith.

I. SECTION 2518(5) OF TITLE III MANDATES THAT NARCOTICS AGENTS MAKE GOOD FAITH EFFORTS TO MINIMIZE THE INTERCEPTION OF INNOCENT CONVERSATIONS AND THAT SUCH EFFORTS BE REASONABLE UNDER THE CIRCUMSTANCES THE AGENTS REASONABLY PERCEIVE AT THE TIME OF THE WIRETAP.

The Government incorrectly reads Petitioners' argument as suggesting the agents "...violated the statute and the orders because they subjectively intended to intercept every call without regard to the minimization requirements..." (Respn. Br., p.16)[4/].

3/ The Government accuses Judge Waddy of using "minimization to mean non-interception," stating that the two concepts are in fact quite different. Gov't Br. 27 n.25. To show the Court's confusion, it cites to pp. 680-81 of the 1974 transcripts--precisely the passage that the Government says has been misinterpreted. Id. Below, it conceded no minimization. App. 45 (Scott II)

4/ Throughout its brief, the Government construes subjective intent as solely referring to the agents' predisposition or state of mind in relation to minimization. As noted below, however, a correct analysis requires subjective inquiry into what the agents reasonably believed and how they acted on their reasonable beliefs, rather than a retrospective assessment of how others might analize the telephone logs.

Furthermore, the Government ardently contends that the appropriate inquiry is not subjective motives, but, as suggested by the court below, "an objective assessment of the facts confronting the police at the time" of the intercepts (Respn. Br. p. 15). Petitioners contend, however, that the monitoring agents must make good faith efforts to minimize unnecessary intrusions in the conduct of the wiretap. Section 2518(5) requires no less,[5/] and the lower courts have uniformly so held.[6/] Absent good faith efforts at compliance with minimization requirements, it is impossible to assess the objective reasonableness of the agents' conduct.[7/] The concession by the Government in this case that the agents made no "effort[s] to shut off any telephone conversations" demonstrates the agents significant disregard for privacy concerns. (1974 tr., pp. 103-103,687).[8/] This alone violates the

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5/ To limit unreasonable intrusions on privacy, Title III regulates police conduct and requires affirmative actions by agents, including, inter alia, minimization and reports to supervising judges. See Petitioners Br., pp. 20-23; United States v. Turner, 528 F.2nd 143, 156 (9th Cir. 1975) (Statute affirmatively requires that measures be adopted to reduce improper interceptions to a practical minimum).

6/ The federal courts are acutely aware of Congressional concern with the serious ramifications of electronic surveillance and its propensity to turn into a general search. Thus the courts have formulated a two-prong inquiry to test minimization; whether the agents made good faith efforts to minimize and whether these efforts were reasonable under the circumstnaces. United States v. Tortorello, 480 F.2nd 764, 784 (2nd Cir., cert denied, 414 U.S. 866 (1973); The courts either explicitly refer to the agents good faith efforts or proceed directly to the reasonableness of those efforts. See, e.g., United States v. Clerkley, 556 F.2nd 709, 718 (4th Cir. 1977) (court more willing to find good faith attempt at minimization when supervising judge requires reports); United States v. James, 494 F.2nd 1007, 1019 (D.C. Cir.), (examine certain factors to determine degree of minimization required in a given case), cert. denied, 419 U.S. 1020 (1974); United States v. Manfredi, 488 F.2nd 588, 600 (2nd Cir. 1973), (methods used to effect minimization must be in good faith and reasonable), cert. denied 417 U.S. 936 (1974).

7/ Of course, cases will arise where it is reasonable for agents to implement few minimization techniques. Yet, agent readiness to do so is a prerequisite to a reasonableness finding.

8/ And the district court so found. See (Pet. Br., p. 25) (App. 28).

requirements of Title III and section 2518(5).[9]

In testing the reasonableness of each interception under the circumstances, the Government ultimately relies upon the call analysis, which it contends is based "not upon what the interceptions ultimately disclosed, but upon the reasonableness of the act of listening in view of the nature of the conversations being overheard." (Respon. Br., p. 25) Petitioners' response is twofold: first, as emphasized in our main brief, the call analysis was prepared in entirety by an United States Attorney after-the-fact, see (Pet. Br., pp. 24-25) and thus reflects only his perceptions and not those of the monitoring agents; Secondly, the call analysis involved terminology and categories that were not indicative of the agents' thinking or information. (1974 tr., p. 143, 332-34).[10] The call analysis thus fails to test the objective reasonableness of the agents' assessment of the facts confronting them at the time of the wiretap.[11]

9/ Because of Title III's unique provisions establishing affirmative police duties, the Government's discussion of search and seizure law is large superfluous. See (Respn. Br. pp. 19-23). No efforts to minimize makes the wiretap tantamount to the general search condemned by this Court in Berger v. New York, 388 U.S. 41 (1967).

10/ The cited testimony was relied upon by Judge Waddy in assessing the call analysis and clarifies Petitioners' statement that "the district court found the call analysis contained errors of characterization and factual inaccuracies and did not represent information known to the agents at the time of interception." (Pets. Br. pp. 25-26); See (A-38); (Respn. Br. p.30)

11/ Kellogg, the call analysis author, testified that it was not "an effort to infer or assert that the agents followed these relatively sophisticated delineations in the course of the intercept." (1974 tr. p. 436). A retrospective call analysis can only be used as circumstantial evidence from which the agents' compliance at the time can be inferred. The inference here is refuted by testimony that no efforts were made to minimize intrusions. (1974 tr., pp. 103-04, 687).

The Government's discussion of whether "the agents entertained a subjective intent...to disregard the minimization requirements ..." also misreads the focus of Petitioners' arguments. (Respn Br. p. 26) As noted above, Petitioners do not allege the agents were predisposed or intended to violate the statute, but rather that no effort was made to comply with its minimization requirements. The uncontradicted testimony of Agent Cooper demonstrates that the agents made no effort to minimize as a discretionary matter, (A. 126), and the Government attorneys, as well as the court below have so recognized: "Throughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations. Thus its position has of necessity been that interception of all 384 conversations was reasonable under the facts of this case." (footnote omitted) United States vs. Scott II, supra. (A.45).

The Government lists several factors to demonstrate the reasonableness of the individual interceptions in the instant case.[12] (Resp. Br. pp. 33-35). Petitioners' wish to clarify their position on several points. First, the fact that the agents found the scope of the conspiracy considerably smaller than anticipated does not relate solely to geographic considerations, but, more importantly, to the agents' need to obtain additional evidence on the local conspirators. The Government's applications

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__/ The Gov't analysis, of course, concentrates on the validity of the interceptions, rather than, as the lower courts uniformly have, on the reasonableness of the agents' minimization efforts. See, e.g., United States vs. Quintana, 508 F.2nd 867, 874 (7th Cir. 1975) (court delineates several factors relevant to whether the government has done all it could to avoid unnecessary intrusion); United States vs. Kirk, 534 F.2nd 1262, 1275 (8th Cir. 1975) (same); United States vs. Armocida, 515 F.2nd 29,44 (3rd Cir.) (factors must be considered in any review of minimization) cert denied, 423 U.S. 858 (1975); see (Pets Br. pp. 27-29)

requesting wiretap orders demonstrate that the main local conspirators were known prior to commencement of the taps. (App. 65,84,100). Ultimately, only fourteen individuals were charged with narcotics offenses in two indictments and of those, eight were customers who bought from a supplier and his two assistants, i.e. Scott, Thurmon, Lee, all known prior to the wiretaps. Thus, as the narrow scope of the conspiracy became apparent to the monitoring agents, minimization efforts should have started. Secondly, as noted in our main brief, the reports to Judge Smith reveal that the agents understood the code language used by the conspirators. Yet, the Government continues to argue the importance of code language in their brief. (Respon. Br., pp. 33-34). Agent Cooper's testimony, however, firmly establishes that the agents were well versed in the code language and were not handicapped by it. (1974 tr., pp. 75-76, 170).[13/]

13/ Agent Cooper testified that "[the monitoring agents] had at least a year's experience and were aware of the code of language that was being used." (1974 tr. p. 170). Furthermore these experienced agents classified only 40% of the intercepted calls as narcotics related in their reports to Judge Smith. See (Pet. Br. pp. 25,28). The implementation of techniques to limit intrusions were thus particularly appropriate.

II. A SEARCH WITHOUT ANY ATTEMPT TO MINIMIZE IS A GENERAL SEARCH, REQUIRING THE SUPPRESSION OF ALL EVIDENCE SEIZED.

The Government contends that, at worst, only some calls were improperly intercepted and dismisses as "extreme" Petitioners' argument that the intercepting agents' complete failure to attempt to minimize renders the entire intercept invalid. Gov't Br. 46. The Government then proceeds to analogize to physical search and seizure situations where agents, initially searching within permissible bounds, stray beyond them Gov't Br. It concludes that only that evidence seized when one strays beyond the permissible bounds is suppressible. Gov't Br. 47-49.

Petitioners would agree with the analogy and the resulting conclusion were it not for the fact that it is irrelevant to any interception conducted in the manner that this one was. An electronic interception is distinct in its scope, conduct and the extent of the invasion of privacy from a physical search. Pet. Br. 32-33 Electronic eavesdropping requires more care than a physical search and seizure due to the much greater opportunity to intercept non-crime related information. When conducted without any attempt to minimize it constitutes a general search. Berger v. New York, 388 U.S. 41 (1967) The framers of the Constitution did not deem it to too "extreme" to condemn general searches. Nor has this Court found it "extreme" to remedy illegal general searches by suppressing all of the evidence gained by that search. Berger vs. New York, supra. This Court has long recognized the great danger to freedom that general searches cause. In Boyd vs. United States, 116 U.S. 616 (1886), the court found unconstitutional a statute that would have had the effect of a general search. It relied on the famous English case of Entick vs. Carrington, 19 How. St. Tr. 1029 (1765) in which Lord Camden first underscored how general searches subvert a free society.

The Government concedes that evidence seized as a result of unlawful conduct must be suppressed. Gov't Br. 50 An interception without any attempt to minimize throughout the course of the operation is, by its nature, a general search and is illegal from its inception. Since the entire interception is illegal, all evidence gained from it must be suppressed, regardless of its alleged connection to criminal activity.[14/]

III. BECAUSE THE INTERCEPTION WAS FAULTY IN ITS ENTIRETY, PETITIONER SCOTT HAS STANDING TO SUPPRESS HIS INTERCEPTED CALLS.

The Government asserts that Petitioner Scott should have no standing in this matter because of his intercepted calls were allegedly crime-related. Gov't Br. 52-56 This distinction is meaningless, however, when the entire intercept is unlawful. Since every conversation was intercepted in violation of Judge Smith's order, petitioner Scott must have standing under 18 U. S.C. 2510(11) and 18 U.S.C. 2518(10)(a)(iii). The Government's brief also creates a distinction between standing to suppress his own conversations on any ground he chooses and standing to suppress based on the improperly intercepted calls of other persons. Gov't Br. 52-53. But the latter distinction is unnecessary. A general search taints the interception of every call, and Scott's calls were just as improperly intercepted as everyone else's. Therefore as an aggrieved person whose calls were improperly intercepted, he has standing to suppress his intercepted calls.

14/ The Government queries what it could possibly gain from minimization violations. Gov't Br. 5 n.39 The answers, in one word is evidence.

CONCLUSION

The judgments below should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached copy was mailed on February 21, 1978, to:

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